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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Definition of Markets for Purposes of the)	
Cable Television Mandatory Television)	CS Docket No. 95-178
Broadcast Signal Carriage Rules)	
)	
Implementation of Section 301(d) of the)	
Telecommunications Act of 1996)	
)	
Market Determinations)	

**REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULEMAKING**

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By the Commission:

Comment Date: October 31, 1996

Reply Comment Date: November 15, 1996

Table of Contents

	Paragraph
I. INTRODUCTION	1
II. BACKGROUND	3
III. REPORT AND ORDER	15
A. COMMENTS	16
1. COMPARISON OF ADIs AND DMAs	16
2. EFFECT ON COMMERCIAL BROADCAST TELEVISION STATIONS	19
3. EFFECT ON CABLE SYSTEMS AND THEIR SUBSCRIBERS ..	30
4. EFFECT ON SECTION 614(h) MARKET MODIFICATION PROCESS	36
B. DISCUSSION	39

IV.	FURTHER NOTICE OF PROPOSED RULEMAKING	49
V.	ADMINISTRATIVE MATTERS	54

I. INTRODUCTION

1. By this *Report and Order*, the Commission amends its cable television rules to establish procedures for the determination of local television markets for purposes of the mandatory carriage/retransmission consent election. This action is necessary because the mechanism used by the Commission relies on a commercially published market list that is no longer available. After consideration and analysis of the comments filed in response to the *Notice of Proposed Rulemaking* ("Notice") in this proceeding,¹ the Commission concludes that it is appropriate to switch market definitions from the Arbitron Ratings Company's areas of dominant influence ("ADIs") to Nielsen Media Research's designated market areas ("DMAs") for must-carry/retransmission consent elections. However, we are concerned about a number of issues relating to the transition from one market definition to another and the relationship of such a change to the *ad hoc* market boundary change process provided for in Section 614(h) of the Communications Act. Therefore, we will continue to use Arbitron's *1991-1992 Television ADI Market Guide* market designations for the 1996 election and postpone the switch to Nielsen's DMAs until the must-carry/retransmission consent election that is to take place on October 1, 1999. For subsequent signal carriage elections, we will use updated Nielsen market lists.

2. This approach will allow future market designations to reflect changes in viewing patterns and to be consistent with the market definition used by the television industry for other purposes. It also will provide an opportunity for the Commission and affected parties to consider transitional mechanisms that could facilitate the switch from one market definition to another. Moreover, because the statute now establishes time frames for action on Section 614(h) market modification requests, and because administrative resources are limited, it is particularly important that we focus on the most effective possible means for managing any transition problems. Accordingly, we are adopting a *Further Notice of Proposed Rulemaking* ("Further Notice") in this proceeding to solicit additional information and provide parties an opportunity to further consider issues relating to the transition to market designations based on Nielsen's DMAs. We also seek comment on procedures for refining the Section 614(h) market modification process.

II. BACKGROUND

3. Under the signal carriage provisions added to the Communications Act ("Act") by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), commercial broadcast television stations may elect whether they will be carried by local cable

¹ Notice of Proposed Rulemaking, CS Docket No. 95-178, FCC 95-489, 11 FCC Rcd 1904 (1996). Appendix A is a list of commenters.

television systems under the mandatory carriage ("must-carry") or retransmission consent rules.² A station electing must-carry rights is entitled to insist on cable carriage in its local market. Under retransmission consent, the station and the cable system negotiate the terms of a carriage arrangement and the station is permitted to receive compensation in return for carriage.³ Stations are required to make this election once every three years.⁴ The next election must be made by October 1, 1996, and it will take effect on January 1, 1997.⁵

4. For purposes of these carriage rights, a station is considered local on all cable systems located in the same television market as the station. As enacted in 1992, Section 614(h)(1)(C) of the Act specifies that a station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the Commission's rules, as in effect on May 1, 1991. Section 73.3555(d)(3)(i), now redesignated as Section 73.3555(e)(3)(i), is a separate rule dealing with broadcast station ownership issues that refers to Arbitron's "areas of dominant influence."⁶ An area of dominant influence, or ADI, as defined by Arbitron, an audience research organization, is a geographic market designation that defines each television market based on measured viewing patterns. Essentially, each county or portion of a county in the contiguous areas of the United States is allocated to a discrete market based on which home-market stations receive a preponderance of total viewing hours in the county.⁷

5. Accordingly, in its 1993 *Report and Order in MM Docket 92-259*⁸ implementing this provision of the 1992 Cable Act, the Commission adopted Section 76.55(e) of the rules which provides:

² Section 6 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), added a new Section 325(b) to the Communications Act of 1934, as amended, to provide commercial broadcast television stations with the opportunity to seek retransmission consent for carriage of their stations. It also provides for the triennial election process. 47 U.S.C. § 325(b). Section 614 was added to the Act by Section 4 of the 1992 Cable Act. It sets forth broadcasters' carriage rights under must-carry and the obligation of cable operators to carry local commercial television stations. 47 U.S.C. § 534.

³ A cable operator must receive retransmission consent to carry any commercial television stations licensed to a market other than its local market. 47 U.S.C. § 325(b)(1). See also 47 C.F.R. § 76.64(a).

⁴ 47 U.S.C. § 325(b)(3)(B).

⁵ 47 U.S.C. § 76.64(f)(2).

⁶ 47 C.F.R. § 73.3555(e)(3)(i).

⁷ For purposes of this calculation, both over-the-air and cable television viewing are included. Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, see Arbitron Ratings Company's *Description of Methodology*.

⁸ 8 FCC Red 2965-2975-2976 (1993).

(1) a local commercial broadcast television station's market shall be defined as its Area of Dominant Influence (ADI) as determined by Arbitron and published in its Television ADI Market Guide or any successor publication, as noted below, except that for areas outside the contiguous 48 states, the areas of dominant influence may be defined using Nielsen's Designated Market Area, where applicable and that Puerto Rico, the U.S. Virgin Islands, and Guam will each be considered one ADI.

6. In addition to Arbitron's ADIs that generally define the area in which a station is entitled to insist on carriage, Section 614(h) of the Act directs the Commission to consider individual requests for changes in market designations, including the determination that particular communities are part of more than one television market.⁹ The Act provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such stations's television market to better effectuate the purposes of this section.¹⁰

7. Section 614(h)(1)(C)(ii) states that in considering requests for market modifications the Commission must consider several factors:

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.¹¹

⁹ Section 614(h)(1)(C)(i), 47 U.S.C. § 534(h)(1)(C)(i).

¹⁰ The 1996 Act revised Section 614(h)(1)(C)(iv) to require the Commission to act on such requests within 120 days.

¹¹ Section 614(h)(1)(C)(ii), 47 U.S.C. § 534(h)(1)(C)(ii). See also *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965 (1993) at 2976-2977 ¶¶ 42-47.

Section 76.59 of the rules provides that broadcast stations and cable operators shall submit requests for market modifications in accordance with the procedures for filing petitions for special relief.¹²

8. A station is entitled to elect must-carry status on all cable systems located in the geographic area defined as its local market. Under the existing rule, the local market is its ADI as specified in Section 76.55(e), modified to include or exclude communities as a result of Commission decisions on individual requests. For a cable operator, this geographic area defines the set of local must-carry stations it is required to carry. A change in the definition of "local market" in Section 76.55(e) could change the geographic area in which a station could insist on carriage and the complement of stations entitled to such rights on a given cable system.

9. The market definitions used for signal carriage purposes are cross-referenced and incorporated into the Copyright Act¹³ and, therefore, also have copyright consequences. Under the "compulsory copyright licensing" provisions of Section 111 of the Copyright Act, different copyright fees are established for local signals than are established for distant signals. Whether a station is local or distant for copyright purposes can affect whether a station is entitled to mandatory carriage.¹⁴ Section 614 provides that a station that would be considered distant under Section 111 of the Copyright Act is not considered local unless the station agrees to indemnify the cable operator for any copyright liability resulting from carriage on the cable system.¹⁵

10. Prior to passage of the Satellite Home Viewer Act of 1994 ("1994 Satellite Act"), "local" for copyright purposes was defined in terms of the Commission's 1976 mandatory broadcast signal carriage rules, which were primarily based on mileage zones around the cable system -- a 35-mile radius for the top 100 markets and a 55-mile radius for smaller markets.¹⁶ The 1994 Satellite Act broadened this definition to define "local service area of a primary transmitter" to include:

such station's television market as defined in Section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modification to such television market made, on or after September 18, 1993, pursuant to Section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations, or in the case of a television broadcast station licensed by an appropriate governmental authority

¹² 47 C.F.R. § 76.7.

¹³ 17 U.S.C. § 111(f) (Definition of "local service area of a primary transmitter.")

¹⁴ Section 614(h)(1)(B), 47 U.S.C. § 534(h)(1)(B); 47 C.F.R. § 76.55(c)(2).

¹⁵ *Id.*

¹⁶ P.L. 103-369, 108 Stat. 3477 (1994). *See also* United States Copyright Office of the Library of Congress ("Copyright Office") Comments at 1-2.

of Canada or Mexico, the area in which it could be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations.¹⁷

11. In 1993, the Commission also established a procedure to update the applicable ADI market list for each election cycle. The appropriate market lists were defined in the note added to Section 76.55(e) that provides:

Note: For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the *1991-1992 Television ADI Market Guide*, available from the Arbitron Rating Co., 312 Marshall Avenue, Laurel, MD will apply. ADI assignments will be updated at three-year intervals. For the 1996 election period, the 1994-1995 ADI list will be used; the applicable list for the 1999 election will be the 1997-1998 list, etc.

12. Since the Commission established the mechanism for determining a station's local market for purposes of the triennial must-carry/retransmission consent elections, Arbitron abandoned the television research business. Thus, the publications referred to in the rules will not be available and new procedures for defining market areas for this purpose must be established. On December 8, 1995, the Commission issued the *Notice* in this proceeding to seek comment on alternative procedures.

13. On February 8, 1996, during the pendency of this proceeding, the Telecommunications Act of 1996 ("1996 Act") was enacted.¹⁸ Congress recognized Arbitron's departure from the television business and in the 1996 Act replaced the specific language cross-referencing Arbitron's ADIs in Section 614 with a more general definition of a local market. Specifically, Section 614(h)(1)(C) of the Act was amended by Section 301 of the 1996 Act to require that for purposes of applying the mandatory carriage provisions a broadcasting station's market shall be determined "by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. . . ."

14. In the *Notice*, the Commission sought comment on three proposed options and suggested alternatives.¹⁹ First, the Commission could substitute Nielsen Media Research's "designated market areas" or "DMAs" for Arbitron's ADIs. While similar in many ways, there are differences between DMA and ADI market areas. A switch from ADIs to DMAs could result in a change in the area in which a station can insist on carriage rights and a change in the stations that a cable system is required to carry. The second option would be to continue to use Arbitron's *1991-1992 Television ADI Market Guide* to define market areas, subject to individual review and refinement through the Section 614(h) process. Under this option, the local market

¹⁷ 17 U.S.C. § 111(f).

¹⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁹ No alternative proposals were suggested by commenters.

definition would remain unchanged, subject only to future individual market modifications. A third proposal would be to retain the existing market definitions for the 1996 election period and switch to a Nielsen based standard for subsequent elections. In this *Report and Order*, we amend Section 76.55 of the rules to specify the use of Arbitron's 1991-1992 ADI market list for the 1996 election and to define local television markets based on DMAs for the 1999 election period and to update the market list for subsequent elections. We issue the *Further Notice* to solicit comment on transition mechanisms that could facilitate the switch from ADIs to DMAs and a proposal to require the submission of more specific information for Section 614(h) market modification petitions.

III. REPORT AND ORDER

15. In considering the three options proposed in the *Notice*, the primary issue is whether the Commission should substitute DMAs for ADIs. The Commission must consider the implications of using a revised definition on all affected parties -- stations, cable systems, cable subscribers. This decision will determine the geographic area in which stations may insist on cable carriage, the signal carriage obligations of cable operators, and the programming available to cable subscribers.

A. Comments

1. *Comparison of ADIs and DMAs*

16. Historically, Arbitron and Nielsen have been the primary national television ratings services. Conceptually, their market designations -- ADIs and DMAs -- are the same. They both use audience surveys of cable and noncable households to determine the assignment of counties to television markets based on the market whose stations receive the largest share of viewing in the county.²⁰ The differences in their assignments of specific counties to particular markets reflect a number of factors, including slightly different methodologies and criteria²¹ as well as normal sampling and statistical variations. Each company also has a policy for

²⁰ Arbitron Ratings Company, *Description of Methodology*; Nielsen Media Research, *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

²¹ For example, Arbitron surveys over a total week defined as Sunday-Saturday, 6 a.m. to 2 a.m., and Nielsen's definition of total week is based on viewing from Monday-Sunday, 7 a.m.-1 a.m. See Association of Local Television Stations ("ALTV") Comments at 7-9; National Association of Broadcasters ("NAB") Comments at 4.

determining what constitutes a separate market based on a complex formula.²² In addition, these services reserve the right to take into account other considerations.²³

17. In general, each ratings service's market designations vary little from year to year, as demonstrated by the information provided in several comments.²⁴ For example, Roberts Broadcasting Company and Whitehead Media ("Roberts"), Christian Network, and Evening Post Publishing, Hubbard Broadcasting, Paxson Communications and Wabash Valley Broadcasting ("Evening Post") compared the 1988-1989 ADI list with the 1991-1992 list and found that over this three year period approximately 97 counties in 64 markets had changed market assignments.²⁵ DeSoto Broadcasting (DeSoto") states that only 30-40 counties move between DMAs from one year to another, principally because a station has changed its facilities or a cable system has changed carriage, thus affecting viewership.²⁶ In its comments, Cox Communications ("Cox") compared the counties assigned by Arbitron to each of the 30 ADI markets alphabetically between Springfield-Decatur-Champaign, Illinois, and Zanesville, Ohio, for 1991-1992 with the counties for these same markets for 1981-82 and found that 23 out of the 30 markets remained unchanged or only added or deleted one county over the period.²⁷

18. However, the differences between DMAs and ADIs are greater than the variations of either service from year to year. The National Association of Broadcasters ("NAB") submits information regarding the differences between the 1991-1992 ADI market list and the current 1995-1996 DMA list. It found that 126 markets would be affected, with approximately 79

²² For example, Arbitron considers some areas, such as Hagerstown, Maryland, or Sarasota, Florida, as separate markets. See Arbitron Ratings Company, *Description of Methodology*; Nielsen Media Research, *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

²³ For example, Arbitron states that it "reserves the right to exercise its professional judgment in county assignment policies in the case of counties with unusual geographic, topographic, ethnic, historical, marketing or other exceptional circumstances." Arbitron Ratings Company, *Description of Methodology*, January 1989, at 4. In this respect, Withers claims that Arbitron combined the Victoria, Texas, market with San Antonio when Withers refused to subscribe to the service. Withers Comments at 2-3. Similarly, Nielsen "reserves the right not to create a DMA. . . if there is a lack of sufficient financial support for Nielsen Service in that potential DMA." Nielsen Media Research, *Nielsen Station Index: Methodology Techniques and Data Interpretation*, 1994-95 at 2.

²⁴ In 1993, on this basis, the Commission decided that ADI designations should be updated every three years to coincide with the must-carry retransmission consent election. The Commission concluded that this procedure would take into account changing markets and provide stability for affected parties. 8 FCC Rcd 2975 ¶ 39.

²⁵ Roberts Comments at 5, n.10; Christian Network Comments at 6, n.10; Evening Post Comments at 5, n.10.

²⁶ DeSoto Comments at 5.

²⁷ Cox Comments at 3.

markets gaining counties and 83 markets losing counties.²⁸ The Commission observes that this group represents more than half of the 211 DMA markets.²⁹ A National Cable Television Association ("NCTA") market-by-market analysis indicates that many markets will gain or lose at least three or four counties based on a comparison of the 1991-1992 ADI list and current DMA assignments.³⁰

2. *Effect on Commercial Broadcast Television Stations*

19. In the *Notice*, the Commission asked whether changing the market designation standard from ADI markets to current DMAs or revising market boundaries every three years using a DMA standard involves any systematic improvement in market definitions.³¹

20. NAB, KPNX Broadcasting Company ("KPNX"), and others state that a switch to DMAs would fulfill Congress' objective "to ensure that television stations be carried in the areas which they serve and which form their economic market."³² NAB and the Association of Local Television Stations ("ALTV") contend that Congress' preference for ADIs arises from the fact that ADIs were the most widely accepted industry definition and that the Commission had a history of using ADIs for application of its rules.³³

21. Broadcasting interests state that DMA markets have replaced the defunct ADIs for commercial purposes and now are the industry standard for measuring television markets.³⁴ Commenters assert that DMAs are now used for program acquisition, advertising sales, and network compensation.³⁵ DMAs also now define the markets within which cable operators and

²⁸ NAB Comments at 4. Some of these markets are affected by gains and losses so the total exceeds 126. Other commenters, however, estimate that 122 counties would be affected. Christian Network Comments at 6, n.10; Roberts Comments at 5, n.10; Evening Post Comments at 5, n.10.

²⁹ See also Post Company ("Post") Reply Comments at 2.

³⁰ NCTA Comments at 3.

³¹ *Notice*, 11 FCC Rcd 1905 ¶ 7.

³² NAB Comments at 3; ALTV Comments at 11; Evening Post Comments at 3; Christian Network Comments at 3; KPNX Reply Comments at 2. H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

³³ See, e.g., NAB Comments at 5; ALTV Comments at 10.

³⁴ See, e.g., Evening Post Comments at 2; Christian Network Comments at 2; Roberts Comments at 2; KTEN Television Limited Partnership ("KTEN") Comments at 5. However, recent reports indicate that some broadcasters are dissatisfied with Nielsen's methodology, and are seeking alternative sources for audience measurements. David Lieberman, *Static over TV Ratings System*, USA Today, February 20, 1996, at 3B.

³⁵ NAB Comments at 4.

broadcasters compete for advertising.³⁶ Commenters claim that the continued use of 1991-1992 ADIs results in must-carry rights for stations that do not reflect actual market conditions and realities.³⁷ In particular, NAB observes that this change in market realities since 1991-1992 reflects a number of factors: (1) additional viewing of stations, which are being carried on cable systems for the first time as a result of must carry that was not considered in the Arbitron market designation;³⁸ (2) many formerly independent stations now being affiliated with the United Paramount and Warner Brothers networks; and (3) changes in ownership and network affiliations in recent years.³⁹ In addition, ALTV states that the Commission has already considered DMAs "Nielsen's equivalent to the Arbitron ADI" in a number of situations.⁴⁰ United Communications Corporation ("United") and Hearst Corporation ("Hearst") point out that the existing rule applies DMAs outside the 48 contiguous states.⁴¹ For these reasons, commenters argue that DMAs also should replace ADIs for regulatory purposes to ensure that carriage rights are applied in the areas currently served by stations.⁴²

22. A number of broadcasting interests comment that the Commission should update the market designations as it originally planned when Section 76.55 was adopted by substituting DMAs for ADIs in order to track the definitions used by the affected industries.⁴³ A few commenters argue that market definitions are in a constant state of flux and that the switch to DMAs with triennial updates would provide an automatic system that reflects changing markets.⁴⁴ According to NAB, ALTV, and Hearst this would be consistent with the concept adopted by the Commission three years ago, and there does not appear to be any compelling reason to adopt a

³⁶ *Id.* at 5-6.

³⁷ *Id.* at 7-8; ALTV Comments at 11-12; Press Broadcasting Company ("Press") Comments at 2.

³⁸ The method for defining markets is somewhat circular. Both Arbitron and Nielsen markets base their determinations on cable and noncable viewing. Consequently, the determination of future carriage requirements are influenced by past cable carriage. *Notice*, 11 FCC Rcd 1905 n. 9; Small Cable Business Association ("SCBA") Comments at 6-7.

³⁹ NAB Comments at 7-8.

⁴⁰ ALTV cites the use of DMA information for Section 614(h) market modifications and analyses of broadcast ownership issues under Section 73.3555(e)(1) of the rules. ALTV Comments at 7-10.

⁴¹ United Comments at 2; Hearst Reply Comments at 6.

⁴² *See, e.g.*, Christian Network Comments at 3-4. Evening Post Comments at 2-4; Diversified Communications ("Diversified") Comments at 5.

⁴³ *See, e.g.*, Press Comments at 3; DeSoto Comments at 4-5; NAB Reply Comments at 3.

⁴⁴ United Comments at 3-4; Press Comments at 2; Golden Empire Television Corporation ("Golden Empire") Reply Comments at 3..

different approach.⁴⁵ NAB also argues that the Commission's experience with other rules, some using updated market designations⁴⁶ and others that rely on set designations,⁴⁷ provides evidence that periodic updating is preferable.⁴⁸ It contends that as a market list becomes more outdated it becomes more difficult and disruptive to undertake the procedures necessary to reflect current market realities.⁴⁹ Similarly, Christian Network and Evening Post state that it has cost stations, cable systems, and the Commission time and money to adjust the 1971 list of "significantly viewed" stations to reflect current market reality.⁵⁰ Furthermore, KTEN Television Limited Partnership ("KTEN") and Diversified Communications ("Diversified") state that the Commission should not postpone a switch to DMAs until 1999 because broadcasters already use these market designations and no transition period is needed.⁵¹

23. On the other hand, Post Company ("Post") states that the process of changing market designations every three years is a waste of time and wastes the resources of licensees, cable operators, and the Commission without benefit to the public.⁵² Cox believes that the continued use of the 1991-1992 ADI list ensures continuity of service to television audiences and the orderly carriage of local stations.⁵³ The potential disruption resulting from updating would be exacerbated where the updating can be accomplished only by switching to an alternate ratings company, and the differences are more likely to result from that switch than from the difference in markets from one period to another.⁵⁴ Great Trails Broadcasting ("Great Trails") states that, in 1993, the Commission did not contemplate that the first update would result in over half of

⁴⁵ NAB Comments at 7; ALTV Comments at 14; Hearst Reply Comments at 4. ALTV also states that any concern about county shifts based on either transitory changes in audience or statistical quirks is ameliorated by the triennial process that reflects enduring shifts, rather than annual transitory shifts. ALTV Comments at 16.

⁴⁶ E.g., Section 73.3555(e)(i), the rule referenced in the statute applicable to must-carry rights and the prime time access rule ("PTAR"), Section 73.658(k) and Note 1, which will be repealed effective August 30, 1996.

⁴⁷ Section 76.51, the top 100 market list based on Arbitron's 1970 prime time household rankings and Section 76.54, designation of stations considered significantly viewed based on a 1971 Arbitron viewing survey.

⁴⁸ NAB Comments at 9-11.

⁴⁹ *Id.* at 11.

⁵⁰ Christian Network Comments at 5; Evening Post Comments at 5.

⁵¹ KTEN Comments at 6-7; Diversified Comments at 6-7. DeSoto adds that there is no reason to postpone the inevitable. DeSoto Comments at 3-4.

⁵² Post Comments at 2. See also Cole, Raywid & Braverman ("Cole") Reply Comments at 4.

⁵³ Cox Comments at 2-3.

⁵⁴ Cole Comments at 3. In its reply, Cole notes that NAB does not quantify how many of the 126 markets that would be affected by a switch to DMAs result from market evolutions and how many are due to the methodological differences between Arbitron and Nielsen. Cole Reply Comments at 2.

all markets being changed, not because of viewing pattern shifts, but because of the differences in the way Arbitron and Nielsen "crunched the numbers."⁵⁵ As NCTA and Great Trails note, in the past the Commission has avoided such disruptions by freezing market designations, such as the top 100 list and the list of "significantly viewed" stations.⁵⁶ However, Great Trails believes that using ADIs for this year's election and switching to DMAs for subsequent elections would lend stability to the process and foster a graceful transition since stations will be on notice that a change will occur in three years.⁵⁷ Post, while favoring the continued use of the ADI list, states that if a change to DMAs is needed it should be postponed until 1999 to avoid the problems associated with a last minute switch and to permit parties to file for market modifications.⁵⁸

24. The Commission specifically sought information on whether DMAs provide a systematically better methodology for determining signal carriage rights, as opposed to their use for other purposes. Commenters do not submit data to support the contention that DMAs generally provide a better definition of stations' service areas than ADIs. A number of individual station licensees claim that they would benefit from a switch to DMA market designations. Several commenters support the use of DMAs because they would be able to increase the geographic area in which they could insist on must-carry rights: United, licensee of KEYC-TV, Mankato, Minnesota;⁵⁹ Fouce Amusement Enterprises ("Fouce"), licensee of KCRA, Riverside, California;⁶⁰ the Christian Network, which owns six stations and operates the Worship Network, an interactive ministry, with 125 broadcast and cable affiliates;⁶¹ Blackstar of Ann Arbor ("Blackstar"), licensee of WBSX(TV), Ann Arbor, Michigan;⁶² and KPNX, licensee of a Phoenix station.⁶³

25. Withers Broadcasting Company of Texas ("Withers"), licensee of KAVU-TV, Victoria, Texas, prefers the separate market designation given its smaller market. It believes that it is unfair to lump small market stations into larger markets and for that reason supports the use

⁵⁵ Great Trails Reply Comments at 5. *See also* Cole Reply Comments at 2.

⁵⁶ NCTA Comments at 4; Great Trails Reply Comments at 5.

⁵⁷ Great Trails Comments at 7-8; Great Trails Reply Comments at 5.

⁵⁸ Post Reply Comments at 2-3.

⁵⁹ United Comments at 4-5.

⁶⁰ Fouce Comments at 2-3.

⁶¹ Christian Network Comments at 1-2.

⁶² Blackstar Reply Comments at 6-8.

⁶³ KPNX Reply Comments at 3.

of current DMAs which will benefit it.⁶⁴ DeSoto is the licensee of WBSV-TV, Venice Florida, part of a separate Sarasota ADI market.⁶⁵ Nielsen includes Sarasota in the larger Tampa-St. Petersburg market. DeSoto states that it would benefit by being part of the larger market and gaining must-carry rights on an increased number of cable systems.⁶⁶

26. Other petitioners claim specific problems with Arbitron's assignments. SL, a petitioner seeking authority from the Commission to commence operation of a new UHF station in Blanco, Texas, believes that under the Arbitron market designations it would be assigned to the San Antonio market. SL Communications ("SL") states that Blanco County historically has had closer ties to Austin, which is reflected in the current DMA assignments.⁶⁷ Costa de Oro Television ("Costa"), licensee of KSTV(TV), Ventura, California, asserts that the 1991-1992 guide includes a note that states that the station requested assignment to the Santa Barbara ADI, rather than the Los Angeles market where Ventura is located.⁶⁸ Costa states that neither it nor Arbitron have a record of this request, but the Commission has denied KSTV(TV) carriage in Los Angeles based on this note.⁶⁹ Costa asserts that a switch to the DMA market list will resolve its problem without further action by the Commission.

27. However, there are television stations that support retaining ADIs, at least for the 1996 election period. Great Trails states that the Commission must consider the impact of any change in must-carry zones, since the changes could lead to the loss of key local service to television stations, especially those served by outlying stations, such as WHAG-TV, Hagerstown, owned by Great Trails.⁷⁰ Post, licensee of KIFI, Idaho Falls, Idaho, notes that market boundaries

⁶⁴ Withers Comments at 1-3. 6. Commenter notes that, in 1994, Arbitron combined Victoria with the San Antonio market, although they remain separate DMAs. However, according to the 1991-1992 market list, Victoria is a separate market.

⁶⁵ DeSoto Comments at 1.

⁶⁶ *Id.* at 5-6.

⁶⁷ SL Comments at 5-6. We note that on the 1991-1992 ADI list, Blanco County is assigned to the Austin market. In addition, SL submits that new stations should be entitled to must-carry treatment that reflects television viewing at the time they commence operations and to ensure this, the DMAs should be adopted. Alternatively, SL proposes that a station be allowed to rely on any differences between the most recent DMAs and the ADIs, with the DMA market definition prevailing.

⁶⁸ Costa Comments at 5-6.

⁶⁹ *Id.* at 5-6. A reconsideration of the Cable Services Bureau denial of carriage is pending.

⁷⁰ Great Trails Comments at 2-3. Great Trails also asserts that the Commission should retain the closest affiliate rule, Section 76.56(b)(5). Under this rule, cable systems must carry the closest geographic affiliate, thereby maximizing the potential for cable subscribers to receive local news and informational programming of specific interest to them. Without this rule, a cable operator could replace a station, such as WHAG-TV, with a stronger or larger city station, such as WRC-TV from Washington, D.C., which is assigned to the same market. Great Trails

are likely to change due to the transitory nature of audience levels, especially in the West, and that continued use of the ADIs is preferable.⁷¹

28. Cox, the operator of a cable system in Phoenix, provides an example of the effect of using DMAs instead of ADIs in its market. It states that Flagstaff is part of the Phoenix DMA, but not the Phoenix ADI. Flagstaff is over 120 miles from Phoenix, yet its stations would be entitled to carriage if a DMA standard was adopted. Cox claims that it would have to drop cable programming to add the Flagstaff stations that do not provide local service for the Phoenix area and that this would be detrimental to its subscribers. It states that the only beneficiaries of this shift would be the Flagstaff stations that might increase their advertising revenues.⁷²

29. In addition to ADI market designations, the rules provide a "home county" exception to the standard ADI designation. Under this rule, which applies in a limited number of instances, a station that primarily serves and has been assigned by Arbitron to a market other than the ADI in which the station's county of license happens to be located is entitled to assert must-carry rights in that "home county."⁷³ In response to the request in the *Notice* for comment on whether a change of market designations would affect this rule, NAB and Hearst conclude that there appears to be no reason to change this "home county" rule.⁷⁴ Cox, however, states that a switch to DMAs would raise questions about the applicability of this rule.⁷⁵

3. *Effect on Cable Systems and Their Subscribers*

30. A cable operator would be required to carry a different set of local must-carry stations if the county where its system is located shifts from one market to another as a result of a DMA assignment which is different from the existing ADI market list. In response to a request for or election of mandatory signal carriage from a station, a cable operator must determine whether the station provides a good quality signal⁷⁶ or would result in additional copyright

Comments at 6-7; Great Trails Reply Comments at 6-7. *See also* NAB Reply Comments at 5-6; United Reply Comments at 5. Section 76.56(b)(5) of the rules implements a statutory requirement and is not subject to change in this proceeding or otherwise. Section 614(b)(2)(B), 47 U.S.C. § 534(b)(2)(B).

⁷¹ Post Comments at 2.

⁷² Cox Comments at 5-6. Cox states that it has already received carriage requests from the Flagstaff stations that are anticipating a shift to a DMA based scheme. *Id.*

⁷³ *See* 8 FCC Rcd at 2975 ¶ 39; 47 C.F.R. § 76.55(e)(3).

⁷⁴ NAB Comments at 11-12; Hearst Reply Comments at 3.

⁷⁵ Cox Comments at 4.

⁷⁶ Section 614(h)(1)(B)(iii), 47 U.S.C. § 534(h)(1)(B)(iii); 47 C.F.R. § 76.55(c)(2).

liability being incurred.⁷⁷ If the cable operator finds that the station does not place a good quality signal over its system's headend or that a compulsory copyright liability would result from the signal's carriage, the operator must inform the licensee. The broadcaster then must decide whether to take the steps necessary to provide a good quality signal to the headend or whether it will indemnify the cable operator to obtain must-carry rights. In addition, a station requesting must-carry status is entitled to request a channel position, selected from several statutorily mandated options.⁷⁸

31. Cable operators state that they would face significant administrative burdens and costs if markets were designated using DMAs and they were required to undertake these various administrative requirements of the must-carry rules.⁷⁹ NCTA and Cox assert that a change to DMAs also would affect the established relationships between broadcasters and cable operators that are based on the present ADI designations. NCTA states that changing to DMAs would require broadcasters and cable operators to start anew in their dealings on signal carriage issues. It argues that there will be no public benefit from upending such established relationships.⁸⁰ Cox observes that many retransmission agreements were for more than three years and these arrangements were entered into assuming that a station's market would not change much in the future. A switch to DMAs would frustrate those expectations.⁸¹ Furthermore, Post asserts that cable operators are only now beginning to stabilize their line-ups following the adoption of the provisions of the 1992 Cable Act and 1994 Satellite Act.⁸² Post claims that cable operators are just beginning to provide some level of continuity of service to cable viewers, especially those in outlying areas that depend heavily on cable carriage of area stations, and subscribers would be disserved by destabilizing cable carriage line-ups again.⁸³

32. The Small Cable Business Association ("SCBA") states that must-carry compliance represents a significant source of administrative burdens and costs for small cable systems. It claims that any wholesale changes made to the market definition standards and procedures will increase the burdens and costs of compliance and the small cable operators and their subscribers

⁷⁷ Section 614(h)(1)(B)(ii), 47 U.S.C. § 534(h)(1)(B)(ii); 47 C.F.R. § 76.55(c)(3).

⁷⁸ Section 614(b)(6), 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57.

⁷⁹ SCBA Comments at 4-6; NCTA Comments at 5, 9; Cole Comments at 4. ALTV and NAB dispute these claims and argue that there is no factual basis for them. ALTV Reply Comments at 4; NAB Reply Comments at 4-5.

⁸⁰ NCTA Comments at 5.

⁸¹ Cox Comments at 4.

⁸² It notes that market modification and complaints are still being resolved. Post Comments at 2.

⁸³ *Id.*

will shoulder a disproportionate share of these burdens and costs.⁸⁴ SCBA contends that changing the method of defining television markets will alter many market boundaries, especially in fringe areas between contiguous markets that are most likely served by small cable companies.⁸⁵ In many cases, small cable systems need to hire outside professional assistance to administer these undertakings.⁸⁶ Moreover, SCBA notes that the 1992 Cable Act requires the Commission to reduce the burdens and costs of rate regulations on small operators. It argues that retaining the existing market definition will continue to serve this policy.⁸⁷

33. GTE Service Corporation ("GTE") adds that many new market entrants, such as local exchange carriers ("LECs"), are planning to operate cable systems under Title VI or open video systems ("OVSs") under rules to be promulgated shortly. They are beginning the process of determining their potential must-carry obligations and likely channel line-ups for initial service roll-out. They argue that altering the market designations of local broadcast stations for purposes of the must-carry rules would only frustrate the efforts of these new providers to effectively enter and compete in local cable markets.⁸⁸

34. While the recent United States Copyright Office of the Library of Congress ("Copyright Office") policy decision clarifies that stations that obtain must-carry rights through a change in market designation will not incur additional copyright liability for the system or station, the continued carriage of other stations, such as former must-carry signals, might result in a copyright liability.⁸⁹ Cole, Raywid & Braverman filing on behalf of cable operators and cable associations ("Cole"), Cox, and NCTA explain that if the Commission changes to DMAs, current must-carry stations now treated as local for copyright purposes could become distant signals.⁹⁰ Then cable operators would have to choose whether to incur further copyright fees for carriage of these stations or risk subscriber dissatisfaction over dropping stations they are accustomed to viewing that are no longer entitled to must-carry status.⁹¹ Commenters state that cable operators and broadcasters would have to reevaluate copyright liability for every station on every cable system nationwide. Post states that a change in the definition of local for copyright

⁸⁴ SCBA Comments at 1.

⁸⁵ *Id.* at 3.

⁸⁶ SCBA Comments at 4-6.

⁸⁷ *Id.* at 2.

⁸⁸ GTE Reply Comments at 2.

⁸⁹ Under the retransmission consent provisions, a cable operator can continue to carry former must-carry signals as long as the broadcaster grants consent.

⁹⁰ Cole Comments at 4-5; Cox Comments at 6-7; NCTA Comments at 8-9.

⁹¹ NCTA Comments at 9; Cole Reply Comments at 3.

purposes also will lead to a large number of petitions being filed with the Commission in order to maintain existing carriage without copyright payments.⁹² However, NAB asserts that there will be no disruption to copyright liability as the Copyright Office will use the Commission's market list, pursuant to its policy decision.⁹³

35. Post, GTE, and a number of cable interests address the impact of switching to DMAs on cable subscribers. They state that new market designations will result in the reshuffling of cable carriage line-ups with no apparent benefit to the public.⁹⁴ They assert that a switch would disrupt viewing patterns of cable subscribers and would subject them to needless channel changes and confusing channel realignments.⁹⁵ Cole further argues that the Commission previously recognized the importance of minimizing disruption (e.g., when it required cable operators to maintain the status quo during the pendency of a market modification petition).⁹⁶ NCTA states that, in adopting the must-carry rules, the Commission recognized the importance of "certainty of service and minimal disruption" for subscribers.⁹⁷ The Cable Telecommunications Association ("CATA") states that implementation of the numerous provisions of the 1992 Cable Act has caused a considerable degree of subscriber confusion, which is bad for business.⁹⁸ CATA, NCTA, and SCBA argue that a switch to a DMA standard will require changes in channel line-ups and channel positions that cause unnecessary disruptions for cable subscribers.⁹⁹ However, United disputes the cable operators' claims and asserts that they frequently change line-ups based on subscriber preferences and arrangements between cable operators and programming networks.¹⁰⁰

⁹² Pursuant to Section 76.54, 47 C.F.R. § 76.54, a station can petition the Commission for a declaration of "significantly viewed" status. A station is considered significantly viewed if, on the basis of audience surveys of off-air (noncable) viewing, it meets the audience criteria specified in Section 76.5(i) of the rules, 47 C.F.R. § 76.5(i). A station that is considered significantly viewed is treated as local in many instances. In particular, the Commission notes that the number of petitions for significantly viewed status has decreased substantially recently. Prior to passage of the 1994 Satellite Act, a station located in the same ADI as the cable system, but beyond the boundaries of the 1976 must-carry zones that were based in large part on mileage, sought significantly viewed status to be considered local for copyright purposes.

⁹³ NAB Comments at 12-13.

⁹⁴ See, e.g., Post Comments at 1; Cox Comments at 2-3; GTE Reply Comments at 2.

⁹⁵ Cox Comments at 5-6; Cole Comments at 2; NCTA Reply Comments at 2.

⁹⁶ Cole Comments at 4.

⁹⁷ NCTA Comments at 3, citing *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2995 ¶ 124.

⁹⁸ CATA Comments at 2.

⁹⁹ *Id.* at 3; NCTA Comments at 2-3; SCBA Comments at 6.

¹⁰⁰ United Reply Comments at 3-4. See also ALTV Reply Comments at 2-3.

4. *Effect on Section 614(h) Market Modification Process*

36. In the *Notice*, the Commission requested comment on the effect that changing from an ADI to a DMA standard would have on the numerous cases revising market areas with respect to particular stations or cable communities which have already been processed.¹⁰¹ Commenters supporting a switch to DMAs favor keeping in force the previously decided Section 614(h) market modifications.¹⁰² ALTV and Great Trails note that these market modifications have been decided irrespective of market definition and the factors upon which the modifications were based should not change if DMAs are used instead of ADIs.¹⁰³ NAB and others contend that if a station has obtained a determination that a cable system in a specific community is part of its market, such determination should prevail regardless of its DMA assignment where the community is located.¹⁰⁴ Moreover, KTEN and Diversified state that this approach will avoid rehearing arguments previously presented and preserve the resources of both the Commission and affected parties.¹⁰⁵ In addition, Great Trails recommends that the Commission state that parties would have to present compelling evidence to overturn a prior decision and that we would not conduct a *de novo* review in such situations.¹⁰⁶

37. Several of the commenters that support the continued use of existing ADI markets argue that the use of the Section 614(h) is preferable to a switch to DMAs. Post, SCBA, Cole, and Great Trails state that the Section 614(h) process is a better means to fine-tune market boundaries than wholesale changes that do not take into account the particular circumstances present and this process can accommodate any entities disserved by current market definitions.¹⁰⁷ Cole and NCTA state that most cable operators and broadcasters who believe that a market should be modified either because of shifts in viewing patterns or changes in local coverage are

¹⁰¹ A few commenters state that this process must be retained to ensure that individual stations and communities and other interested parties are not harmed by designated boundaries which do not accurately reflect viewing patterns or other relevant factors in a given geographic area. KTEN Comments at 6-6; Diversified Comments at 6-7. As the Commission is required to consider such petitions under the Act, no change to this provision was contemplated.

¹⁰² NAB Comments at 11-12; ALTV Comments at 17; KTEN Comments at 6-7; Diversified Comments at 6-7. See also Great Trails Comments at 3.

¹⁰³ ALTV Comments at 17; Great Trails Reply Comments at 2-3.

¹⁰⁴ NAB Comments at 11-12; Pulitzer Broadcasting Company Reply Comments at 2-3; Great Trails Reply Comments at 3.

¹⁰⁵ KTEN Comments at 6-7; Diversified Comments at 6-7.

¹⁰⁶ Great Trails Comments at 5.

¹⁰⁷ Post Comments at 2-3; SCBA Comments at 7; Cole Comments at 5; Great Trails Comments at 3.

likely to have already filed the appropriate petitions for special relief.¹⁰⁸ In addition, Cole argues that this process provides a relatively simple means to adjust the existing list without triggering wholesale changes inherent in a switch to the Nielsen list. Moreover, Cole contends that the fact that the number of requests for market modifications has not been overwhelming is evidence that the ADI list is not an inappropriate source for initial market designations.¹⁰⁹ NCTA states that changing from one market definition system to another may be inconsistent with the Section 614(h) modifications and could be detrimental to market areas that have already been revised. Further, it would throw into question the continued validity of previous rulings.¹¹⁰

38. Commenters disagree whether there will be increased administrative burdens on the Commission, stations, and cable systems with respect to Section 614(h) market modification petitions if market designations were to be based on DMAs. Several commenters state that, if the more current and widely used DMAs are not adopted, many broadcasters will be required to undertake the time-consuming Section 614(h) petition process to protest ADI boundaries that do not reflect current viewing patterns.¹¹¹ Alternatively, Great Trails, NCTA, and Cole contend that changing to DMAs would start a whole new cycle of Section 614(h) petitions, with stations attempting to regain counties lost between the different methodologies of Arbitron and Nielsen.¹¹² Cole observes that the Commission already faces a tremendous administrative burden implementing the 1996 Act and it would be difficult to resolve the increased volume of market modification cases in a timely fashion.¹¹³ NCTA argues that the Commission will have to allocate substantial resources to handle all the new petitions arising from a change in market designation under the 120 day statutory requirement and that there is no definitive evidence that such a change will benefit audiences.¹¹⁴ Great Trails also argues that this will further complicate retransmission consent negotiations. NCTA states that the Commission is likely to have to respond to additional complaints and requests for clarifications, with no assurance that the switch to DMAs provides a better approach.¹¹⁵

¹⁰⁸ Cole Reply Comments at 4; NCTA Reply Comments at 3. Moreover, stations are now guaranteed a time-certain review process and expedited treatment for their requests for market modifications, pursuant to the amendment of Section 614(h) by the 1996 Act. NCTA Reply Comments at 4.

¹⁰⁹ Cole Comments at 5.

¹¹⁰ NCTA Comments at 7.

¹¹¹ See, e.g., ALTV Comments at 17; KTEN Comments at 5; Diversified Comments at 5; United Comments at 3-4; DeSoto Comments at 4; Hearst Reply Comments at 6; WRNN-TV Associates Limited Partnership ("WRNN-TV") Reply Comments at 3; NAB Reply Comments at 4.

¹¹² Great Trails Comments at 8; NCTA Comments at 9; Cole Comments at 5-6.

¹¹³ Cole Reply Comments at 5.

¹¹⁴ NCTA Reply Comments at 5.

¹¹⁵ NCTA Comments at 9.

B. DISCUSSION

39. The Commission concludes that Nielsen's DMA market assignments provide the most accurate method for determining the areas served by local stations. We recognize the benefits of switching to a market definition based on DMAs. DMAs have become the television market standard for commercial purposes in the absence of any alternative.¹¹⁶ They represent the actual market areas in which broadcasters acquire programming and sell advertising. We also recognize that over time the ADI market list will become outdated and we are aware of the problems associated with freezing a list of market designations.¹¹⁷ Moreover, in general, we continue to believe that our 1993 decision to use updated market designations for each election cycle to account for changing markets is appropriate. Nielsen provides the only generally recognized source for information on television markets that would permit us to retain this policy. Thus, we conclude that the DMA market designations will provide the best method of "delineat[ing] television markets based on viewing patterns"¹¹⁸ over the long term.

40. Cable interests claim that any change in market designations would result in administrative burdens on cable operators and disruption of service to subscribers, although they fail to quantify the extent of these burdens and disruptions.¹¹⁹ We observe that a shift to a DMA standard could result in some stations now available being replaced, some other programming services (i.e., cable networks) being dropped to accommodate situations where the number of stations entitled to carriage increases, and some channel line-ups needing to be reconfigured to accommodate the channel positioning requests of new must-carry signals. Under the framework established in 1993 to use updated market lists for each election, such changes would have occurred in at least some markets due to the redesignation of counties among ADIs by Arbitron. While the impact on stations, systems, and subscribers may be somewhat greater from a switch to a DMA based definition than from an update of the ADI market list, we do not find sufficient grounds to conclude that potential burdens and disruptions would outweigh the benefits of using a more current market list, particularly when over time, the 1991-1992 market list will become an even less accurate measure of television markets.

¹¹⁶ See ¶ 21 *supra*.

¹¹⁷ For example, the Commission compared the Section 76.51 list of top 100 markets with the 1987-1988 market designations and found that 11 markets on the list were no longer in the top 100, 23 other designated communities on the original list had changed and in 18 cases where the market names differed, the Section 76.51 list included communities not included in Arbitron's 1987-1988 list. NAB Comments at 10 citing *Further Notice of Proposed Rulemaking* in MM Docket No. 87-24, 3 FCC Rcd 6171, 6176 (1988) ¶ 36.

¹¹⁸ Section 614(h)(1)(C), 47 U.S.C. § 534(h)(1)(C), as amended by the 1996 Act.

¹¹⁹ NCTA, in particular, notes that during the implementation of the signal carriage provisions of the 1992 Cable Act, subscribers were subjected to extensive channel realignments and service changes, as little-watched stations exercised their newly-acquired must-carry rights and cable operators had to drop popular cable programming services to accommodate them. NCTA states that many subscriber were frustrated and directed their complaints at their local cable operators, franchise authorities, and the Commission. NCTA Comments at 4.

41. Commenters supporting the continued use of ADIs also have not demonstrated that a DMA standard will prevent subscribers from receiving the appropriate local stations. In this regard, they fail to recognize that DMA market designations are based on viewing in cable and noncable homes. Thus, any reassignment of a county from one market to another will take into account current cable carriage of local stations and the size of the audience that such stations receive in cable households.

42. In addition, a number of commenters claim that a switch to DMAs will require a reevaluation of compulsory copyright liability for numerous stations. The 1994 Satellite Act, however, eliminates the potential for conflicts between the area where a station is local for signal carriage purposes and where it is local for copyright purposes since that act incorporates the Commission's definition of a local market. A recent policy decision by the Copyright Office, on December 18, 1995, while this proceeding was pending, further clarifies this policy.¹²⁰ In its comments, the Copyright Office states that cable systems now determine a station's local service area for copyright purposes according to either the 1976 must-carry rules or Section 76.55(e), with modifications made under Section 76.59, whichever results in a larger service area.¹²¹ Accordingly, as the Copyright Office points out in its comments, any decision made regarding changes in local markets for signal carriage purposes will be applied to the compulsory license process.¹²² With respect to local stations now carried which will no longer be considered local under a revised definition, cable operators will have the option of obtaining retransmission consent for continued carriage from the broadcaster and any issues relating to copyright liability can be negotiated as part of such agreements.

43. Accordingly, we believe that DMA market designations, updated for each election cycle, provide the best method of ensuring local stations access to the consumers they are licensed to serve and to provide cable subscribers with the stations best suited to their needs and interests. We are concerned, however, about potential problems that might result from an immediate change of market definitions. From the data provided in the record, it is clear that a greater number of stations, cable systems, and cable subscribers would be affected by a switch to DMAs than would be affected by simply using an updated ADI market list, as the rules had contemplated. In particular, we are concerned about the impact of changing the market definition in certain types of situations, such as cases where the differences in methodology and procedures between Arbitron and Nielsen result in significant changes in market areas (e.g., when one service combines a smaller market with a larger market and the other service lists them separately). With the exception of a few individual cases described in the record, the available evidence prevents a complete assessment of possible problems that might arise as a result of changes in broadcasters' must-carry rights due to a shift from an ADI market definition to the current DMA

¹²⁰ 60 Fed. Reg. 65072, 65073-74 (Dec. 18, 1995).

¹²¹ Copyright Office Comments at 2-3. Section 76.59 is the rule implementing the Section 614(h) market modification process.

¹²² Copyright Office Comments at 4-5.

market list. Similarly, the statements of costs and burdens put forth by the cable operators do not provide a means to determine whether there are potential problems associated with a change in definition that could be ameliorated in some manner through transitional procedures. Further, while some cable subscribers will be affected by changing signal carriage requirements resulting from a switch to a DMA standard, there may be ways to minimize the disruptions to their service.

44. The Commission also is concerned about the impact of changing the market definition on the Section 614(h) market modification decisions already in force. Commenters simply provide a consensus that decisions made by the Commission for market modifications should remain in force. However, it is unclear whether cable operators could face conflicting obligations or be subject to carriage of signals from multiple markets based on a revised market standard when these modifications are considered in conjunction with a new market definition. We did not receive any information regarding the effect that such decisions in conjunction with a change to a DMA standard would have on the must-carry obligations of cable operators. In addition, without extensive evidence, we are unable to determine the burden on the Commission to remedy such conflicts that might result from an immediate switch to DMAs. The complexity of such situations and administrative burden on the Commission and others to unravel them also would disrupt the orderly provision of local television service to subscribers.

45. Based on these considerations, the Commission concludes that we should postpone the switch in market designation until the must-carry/retransmission consent election that will occur in 1999 to ensure that any potential transitional problems can be resolved. This approach will avoid the problems associated with the continued use of a specified market list indefinitely, yet it will provide the Commission and affected parties an opportunity to consider measures that will lead to a smooth transition from an ADI to a DMA market designation standard for signal carriage purposes. In particular, this phased-in approach will assuage commenters who expressed concerns that a switch in market definition will cause significant administrative burdens and costs for cable operators, including small cable operators,¹²³ and will impede the entry of new market entrants, such as local exchange carriers planning to operate cable systems under Title VI or the OVS provisions.¹²⁴ During this interim period, we will be able to consider whether to establish transitional procedures to minimize any burdens, costs, or disruptions that might be caused by a change in market designation standard.¹²⁵ Thus, the Commission decides to continue to use 1991-1992 ADI market list for the 1996 election and to establish a framework that uses updated DMA market lists for the 1999 and subsequent elections. In addition, the home county exception is retained in order to ensure that a station is carried in its home county in the limited instances where the station is assigned to a market that does not include its home county.¹²⁶ Thus, in such

¹²³ See ¶¶ 31-32 *supra*.

¹²⁴ See ¶ 33 *supra*.

¹²⁵ See ¶ 50 *infra*.

¹²⁶ See ¶ 29 *supra*. See also 8 FCC Rcd at 2975 ¶ 39.

cases, the station is entitled to elect must-carry or retransmission consent rights in the county where its community of license is located and in the counties assigned to the same market as the station, i.e., its ADI for the next election cycle and its DMA for subsequent cycles.

46. For the time-being, the Commission will rely on market modifications determined pursuant to Section 614(h) to refine market boundaries to account for changes in viewing patterns and market conditions. In this regard, we recognize that DMA market designations are one way to determine local stations and are mindful that information regarding DMAs could be useful in deciding individual cases. We note that ALTV points out that the Cable Services Bureau has considered DMA assignments in a number of cases involving market modifications. In particular, it notes that the Bureau relied in part on Schuyler County, New York's assignment to the Elmira DMA when it was added to the Elmira ADI for signal carriage purposes.¹²⁷ Similarly, ALTV states that the Bureau considered DMA assignments as "additional support for the conclusion" to include the City of Grenada, Mississippi, in the Greenwood-Greenville, Mississippi ADI.¹²⁸ Thus, petitioners are invited to include information regarding the DMA assignments in their petitions under Section 614(h) along with information that demonstrates local service as required by the Act.

47. We believe that this action is consistent with Section 614 as amended by the 1996 Act. The revised statutory language substitutes the specific reference to Arbitron's ADI with a more general requirement that markets be determined on the basis of "a commercial publication which delineates television markets based on viewing patterns." A number of commenters suggest that the revised language of Section 614 clearly refers to Nielsen's DMA publications since they are the principal television market references remaining following the discontinuation of Arbitron's television service.¹²⁹ We find nothing in the revised statutory language defining a local market nor in the associated legislative history that would require the Commission to substitute DMAs for ADIs.¹³⁰ The revised language simply directs the Commission to use a commercially available publication. We conclude that the existing ADI list meets this test. The DMA market listings or any other widely available commercially published source also could satisfy this requirement. Accordingly, we conclude that our decision to continue to use Arbitron's

¹²⁷ ALTV Comments at 12 citing *Smith Television of New York*, 10 FCC Rcd 7127, 7131 (C.S. Bur. 1995).

¹²⁸ ALTV Comments at 12 citing *Greenville Television, Inc.*, 10 FCC Rcd 6491, 6493, n. 11 (C.S. Bur. 1995).

¹²⁹ See, e.g., DeSoto Comments at 1; Fouce Comments at 2; SL Comments at 7; Costa Comments at 7, n. 2; Hearst Reply Comments at 3. Costa and Blackstar argue that it was Congress' intent that the Commission use DMAs, but that it did not specify them as it is possible that Nielsen will cease publication of market designations in the future. Costa Reply Comments at 2-3; Blackstar Reply Comments at 5.

¹³⁰ A number of cable interests concur with this assessment. They argue that the change in statutory language gives the Commission discretion to rely on an alternative ratings service, but also is entirely consistent with a continued reliance on Arbitron's existing ADI list and observe that Congress had the option of specifically designating Nielsen as the source of these market designations, as well as specifying that the market assignments be continually updated, but did not. Cole Comments at 2-3; NCTA Reply Comments at 5.

ADIs for the 1996 election and adopt Nielsen's DMAs for future election cycles is fully consistent with the requirements of the Act.

48. Accordingly, Section 76.55 of the rules is amended to provide that local markets for signal carriage purposes will be determined on the basis of the ADI designations specified in Arbitron's 1991-1992 *ADI Television Market Guide* for the 1996 must-carry/retransmission consent election and Nielsen's *DMA Market and Demographic Rank Report* will be used for the 1999 election, which becomes effective on January 1, 2000.¹³¹ For subsequent elections, the revised rule will provide for the use of updated DMA market lists. In addition, to assess the potential problems associated with a switch to a DMA standard and to determine the impact of this change on Section 614(h) market modification decisions, we also adopt a *Further Notice of Proposed Rulemaking* to solicit additional information. We want to identify any possible problems associated with our decision to shift to the DMA market list in the future and to consider whether transitional procedures that could minimize the disruptions to affected parties would be appropriate.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

49. In this *Further Notice of Proposed Rulemaking*, we seek comment on mechanisms for facilitating the transition from a market definition system based on ADIs to one based on DMAs. We believe it useful to consider means of easing the difficulties that may be associated with what, as the comments indicate, will be changes in the carriage requirements applicable to many cable operators and broadcasters. These changes potentially affect mandatory carriage rights, channel positioning obligations, retransmission consent negotiations, copyright payments, the expectations of cable subscribers, programming contracts, and even the physical layout and construction of cable plant and operations. The comments in this proceeding, however, only addressed most of these issues on a highly generalized basis and have not provided information on what, if any, steps might be taken to facilitate a more orderly transition process to a revised definition of local market for must-carry/retransmission consent elections.

50. By this *Further Notice*, we seek specific suggestions that would assist in this process. Commenters are asked to consider whether special provisions should be made for particular types of stations or systems (e.g., smaller market stations or systems with fewer than a specified number of subscribers) to minimize the disruptions that could occur due to a switch to DMAs. Are any special transitional procedures needed for stations that receive carriage rights under the home county exception in addition to the general local market definition? Further, Nielsen indicates that the DMA assignments of certain stations are based on considerations other

¹³¹ In addition to the market definition changes in Section 76.55, we have revised herein the general authority citation for Part 76 of the rules to correct the citation format and to revise and correct the authority citations.

than viewing patterns.¹³² We request comment on such situations, their effect on stations' must-carry rights and cable systems' signal carriage obligations, and whether additional rules are needed to provide for such cases, either as a transition mechanism or once the DMA standard becomes effective.

51. We are particularly concerned about the effect of changing to a DMA market definition on previous Section 614(h) decisions and decisions that will be made during the election cycle beginning on January 1, 1997, while we continue to use an ADI standard. Specifically, we request commenting parties to address the consequences of a shift in definitions on the more particularized market boundary redefinition process contained in Section 614(h) of the statute, the decisions that have been made under that section, and the proceedings under it that would result from shifting market definitions. We are concerned that a number of parties commenting in this proceeding simply endorse a change to DMA definitions in their particular situations without taking account of the potential for such changes being subject to review and reversal under Section 614(h). Such cases appear particularly likely to occur in those situations where Nielsen has combined previously separate markets or stations on the fringes of markets have significantly revised market areas. One such example, which was referenced in the *Notice* in this proceeding and in the comments, involves the combination of the Washington, D.C., and Hagerstown, Maryland, markets. In markets of this type, some broadcast stations could be either significantly benefited through increased carriage or potentially injured through an increase in major market broadcast station competition into what has been a smaller television market. In either case, however, the changes involved could be challenged through the *ad hoc* process and indeed it seems likely, given the distances, services areas, and historical carriage patterns involved, all of which are specifically referenced in the Section 614(h) decisional criteria, that some effects of the market change would be undone through the individual review process. If such a process appears likely as a result of a change in definitions, it is imperative that every effort be made to minimize the difficulties associated with that process.

52. We seek specific comment on what changes in the modification process might be warranted given that administrative resources available to process Section 614(h) requests are limited and the 1996 Act establishes a 120-day time period for action on these petitions. Accordingly, if instead of market boundaries stabilizing as the existing cases are decided, a continuing flow of modification requests is filed, new techniques will be needed to increase the efficiency of the decision making process. Under the existing process, a party is free to make its case using whatever evidence it deems appropriate. One means of expediting the modification process might be to establish more focused and standardized evidentiary specifications. Therefore, we propose to establish specific evidentiary requirements in order to support market

¹³² Nielsen generally assigns a station to the DMA in which its city of license is located. However, it also provides an opportunity for stations to petition to change their market assignments. See Nielsen Media Research, *Nielsen Station Index: Methodology Techniques and Data Interpretation*, 1994-95 at 35. Moreover, Nielsen's decisions regarding the creation of separate DMAs can be based on considerations other than viewing patterns. *Id.* at 2. See also n. 23 *supra*